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MALAYAN BANKING BHD

v.

BASARUDIN AHMAD KHAN

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FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ARIFIN ZAKARIA FCJ
NIK HASHIM FCJ
[CIVIL APPEAL N0: 02-9-2005 (W)]

C

7 DECEMBER 2006

CONTRACT: *Employment contract - Breach - Action commenced by employer against employee for breach of contract - Whether indemnity clause as contained in employee's service agreement took away employer's*

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right of action for damages for breach of contract - Whether there was an express or implied term in agreement excluding employer's right to such damages - Whether claim was one for damages for breach of contract and not a claim for indemnity

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The appellant bank had employed the respondent and he was, at all material times, the Branch Manager of the appellant's Tanah Merah branch. On joining the appellant, the respondent had executed the Employee's Service Agreement dated 16 June 1979 ('agreement'). In his capacity as Branch Manager, the respondent

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approved banking facilities to numerous borrowers. Following an internal audit that was carried out at the branch, the respondent was found to be guilty of several breaches of his contractual duties. Disciplinary action was subsequently taken against him, culminating in his dismissal. The appellant then commenced this

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action against the respondent, alleging that by reason of the respondent's breaches of duty, incompetence and negligence, the appellant had suffered loss and damages amounting to approximately RM1,583,616.62, which amount the appellant consequently claimed. The learned judge of the High Court agreed

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with the appellant's submission that the respondent had been in breach of the implied term of the contract in failing to carry out his duties with proper care and skill. However, he held that being a claim in indemnity, it was incumbent for the appellant to prove its losses, which it had failed to do. In the circumstances, the

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appellant's claim was dismissed.

On appeal, the Court of Appeal in a majority decision of two to one dismissed the appeal although in coming to its decision, the Court of Appeal disagreed with the High Court on the invocation of an implied term into the contract requiring the respondent to carry out his duties as an employee of the appellant with proper skill and care. The Court of Appeal held that the relevant terms binding on the parties were that as expressly provided in the agreement and there was no room for any implied term. Based on the agreement, it held that the appellant was only entitled to a right in indemnity as provided under the agreement, and that it was imperative for the appellant to prove that it had suffered losses in the pleaded case, which the appellant failed to do. In the present appeal by the appellant, the issue was whether the appellant was only confined to suing on the indemnity because the agreement contained an indemnity clause, or did the appellant have a choice to sue for either a breach of contract or on the indemnity. The appellant submitted that it had such a choice and further contended that at common law, the right of a contracting party to claim damages for breach of contract may only be excluded by express or implied terms of the contract.

Held (allowing the appeal)
Per Arifin Zakaria FCJ:

(1) The fact that the agreement provided for indemnity, that alone, in the absence of any express or implied term in the agreement taking away the appellant's right for damages would not prevent the appellant from making a claim for damages for breach of contract. In short, the indemnity clause as contained in the agreement in the present case did not take away the right of action for damages for breach of contract: the right under s. 74(1) of the Contracts Act 1950. There was no express or implied term in the agreement excluding the appellant's right to damages for breach of contract. In fact, upon close scrutiny of the agreement it was not a contract of indemnity *per se* but rather a contract of employment setting out the contractual duties and obligations of the respondent as an employee of the appellant with an indemnity clause added as an alternative remedy. In the circumstances, the respondent as an employee of the appellant owed a contractual duty of care to the appellant and breach of that duty would render him liable to the appellant in damages for breach of contract. This was the common law right of the appellant as the employer. This right could not be taken away

without an express or implied term in the contract and, in this instance, there was no such term to be found in the agreement. (paras 16 & 24)

(2) In the present case, it was not the respondent's case that the appellant had not incurred any loss at the material time and would not be able to quantify its loss if required to do so. As a matter of fact, the appellant in its claim had estimated its loss, as at 31 March 1995, as being over RM1.5 million. Therefore, it could not be gainsaid that the appellant had not incurred any loss as at the date of the trial. The question of whether it could prove its loss was left to be seen at the assessment of damages stage. Based on the above, the claim in the present case was one for damages for breach of contract and not a claim for indemnity, contrary to the finding of the trial judge and the majority judgment of the Court of Appeal. (paras 30 & 31)

[Judgment entered in favour of appellant on liability; case remitted to High Court for assessment of damages by registrar.]

Bahasa Malaysia *translation of headnotes*

Bank perayu adalah majikan responden di mana responden adalah pada setiap masa material Pengurus Cawangan di cawangan perayu di Tanah Merah. Ketika mula berkhidmat, responden telah memeterai satu perjanjian yang dipanggil Perjanjian Perkhidmatan Pekerja bertarikh 16 Jun 1979 ('perjanjian'). Dalam kapasitinya sebagai Pengurus Cawangan, responden telah meluluskan banyak kemudahan kewangan kepada peminjam-peminjam. Ekoran satu audit dalaman yang dibuat di cawangan, responden telah didapati bersalah melakukan beberapa pelanggaran terhadap tugas kontraktualnya. Tindakan disiplin telah diambil terhadap responden dan akhirnya beliau dibuang kerja. Berikutnya, perayu memulakan tindakan di sini terhadap responden, dengan mendakwa bahawa disebabkan oleh kecuaian, ketidak-kompetenan dan pengabaian responden, perayu telah mengalami kehilangan dan kerugian lebih kurang RM1,583,616.62, sekaligus menuntut jumlah tersebut dari responden. Yang arif hakim Mahkamah Tinggi bersetuju dengan hujah perayu bahawa responden telah melakukan pelanggaran terma-terma tersirat kontrak apabila gagal menjalankan tugas-tugasnya dengan baik dan sempurna. Bagaimanapun, beliau memutuskan bahawa, oleh kerana tuntutan adalah tuntutan untuk

indemniti, perayu bertanggungjawab untuk membuktikan kerugian dan itu gagal dilakukan oleh perayu. Tuntutan perayu, dengan itu, telah ditolak.

Di rayuan, Mahkamah Rayuan melalui satu keputusan majoriti dua lawan satu telah menolak rayuan, walaupun dalam mencapai keputusannya, ia tidak bersetuju dengan Mahkamah Tinggi berhubung pemakaian terma tersirat terhadap kontrak yang mengkehendaki responden menjalankan tugas-tugasnya dengan penuh hemah dan berhati-hati. Mahkamah rayuan memutuskan bahawa terma-terma yang mengikat pihak-pihak mestilah seperti yang tertera secara jelas di dalam perjanjian dan tiada ruang untuk terma tersirat. Diputuskan seterusnya, berdasarkan kepada perjanjian, bahawa perayu hanya berhak kepada indemniti seperti yang diperuntukkan oleh perjanjian, dan dengan itu menjadi tanggungan perayu untuk membuktikan bahawa ia mengalami kerugian dalam kes yang diplidkan, yang mana perayu gagal membuktikannya. Dalam rayuan semasa perayu, isu yang berbangkit adalah sama ada perayu hanya boleh mendakwa berhubung indemniti sahaja disebabkan kewujudan fasal indemniti di dalam perjanjian, atau boleh memilih sama ada untuk mendakwa atas kemungkiran kontrak atau berdasarkan indemniti. Perayu berhujah bahawa ia mempunyai pilihan tersebut sambil berkata bahawa di sisi common law, hak seseorang yang berkontrak untuk menuntut gantirugi kerana kemungkiran kontrak hanya boleh dihapuskan melalui terma-terma kontrak yang jelas atau tersirat.

Diputuskan (membenarkan rayuan)
Oleh Arifin Zakaria HMP:

(1) Fakta bahawa perjanjian memperuntukkan tentang indemniti, dan semata-semata itu tanpa kewujudan terma jelas atau tersirat dalam perjanjian yang menidakkan hak perayu untuk menuntut gantirugi, tidak boleh menghalang perayu dari membuat tuntutan gantirugi kerana kemungkiran kontrak. Pendek kata, fasal indemniti seperti yang terkandung di dalam perjanjian dalam kes semasa tidak menghapuskan hak untuk menuntut gantirugi kerana kemungkiran kontrak: hak di bawah s. 74(1) Akta Kontrak 1950. Tidak terdapat terma-terma jelas atau tersirat di dalam perjanjian yang menyingkir hak perayu untuk mendapat gantirugi kerana kemungkiran kontrak. Malah, melihat kepada perjanjian dengan terperinci, ia bukanlah satu kontrak indemniti *per se* tetapi lebih kepada satu kontrak pekerjaan yang menerangkan tentang hak-hak dan obligasi

responden sebagai pekerja perayu di samping suatu fasal indemniti yang ditambah sebagai remedi alternatif. Dalam keadaan sedemikian, responden selaku pekerja perayu, memikul tanggungjawab kontraktual kepada perayu untuk berjaga-jaga di mana kemungkiran terhadapnya akan mendedahkan responden kepada tanggungan gantirugi kerana kemungkiran kontrak. Ini adalah hak common law perayu sebagai majikan. Hak ini tidak boleh diambil darinya tanpa terma jelas atau tersirat di dalam kontrak, dan dalam kes ini, terma seperti itu tidak wujud.

(2) Dalam kes semasa, kes responden bukanlah bahawa perayu tidak menanggung kerugian pada waktu material atau tidak berupaya menetapkan jumlah kerugian jika diminta berbuat demikian. Fakta menunjukkan bahawa perayu telah pun mentaksir kerugiannya sebagai melebihi RM1.5 juta setakat 31 Mac 1995. Oleh itu perayu tidak boleh dikatakan sebagai tidak menanggung kerugian pada tarikh perbicaraan. Persoalan sama ada perayu boleh membuktikan kerugiannya harus ditentukan di peringkat pentaksiran gantirugi. Berdasarkan semua ini, tuntutan di sini adalah untuk gantirugi bagi kemungkiran kontrak, dan bukan tuntutan untuk indemniti seperti yang diputuskan oleh hakim bicara dan keputusan majoriti Mahkamah Rayuan.

[Penghakiman untuk perayu atas soal liabiliti; kes dikembalikan ke Mahkamah Tinggi untuk taksiran gantirugi oleh pendaftar.]

Case(s) referred to:

Attorney-General v. Blake [2001] AC 268 ***(refd)***

Birmingham and District Land Company v. London and North Western Railway Company [1886] 34 Ch D 261 ***(refd)***

Janata Bank v. Ahmed [1981] IRLR 457 ***(refd)***

Krishnaswami Iyer v. Thathia Raghaviah Chetty & Ors AIR [1928] Madras 43 ***(refd)***

Lister v. Romford Ice and Cold Storage Co Ltd [1957] AC 555 ***(refd)***

Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 ***(refd)***

Management Corporation Strata Title Plan No 1933 v. Liang Huat Aluminium Ltd [2001] 3 SLR 253 ***(foll)***

Montagu Stanley And Company v. JC Solomon, Ltd [1932] 2 KB 287 ***(refd)***

R & H Green & Silley Weir Ltd v. British Railways Board [1985]

Telfar Shipping Corporation v. Inersea Carriers SA [1983] 2 Lloyd's Rep 351 ***(refd)***

Yorkshire Electricity Board v. British Telecommunications plc & Ors [1986] 2 All ER 961 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 74(1)

Other source(s) referred to:
Chitty On Contracts, vol. 1, 29th edn, para 26-001

For the appellant - Lambert Rasa-Ratnam (Sean HM Yeow with him); M/s Lee Hishamuddin Allen & Gledhill
For the respondent - Hj Sulaiman Abdullah (V Manoharan & M Rajenthirakumar with him); M/s Kumar Assoc

[Appeal from Court of Appeal; Civil Appeal No: W-02-59-2002]

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria FCJ:

Background

[1] This is an appeal pursuant to the leave granted by this court on three questions of law which read as follows:

a) In a contract that contains a promise by a party (the promisor) to indemnify the other party (the promisee) for loss if there is a breach of the contract by the promisor, whether the promisee has a right to sue the promisor either for breach of contract or on the indemnity, if there is breach of the contract by the promisor. ("first question")

b) Where loss is an ingredient of a cause of action but the parties have agreed, with the concurrence of the trial judge, to try only the issue of liability first:

   i) Whether having agreed that the trial is only to determine liability first, a party is precluded from subsequently saying that liability has not been established as loss has not been proved. ("second question")

   ii) Whether proof that loss has been sustained without proof of the actual amount of the loss is sufficient for the purpose of completing the cause of action. ("third question")

[2] Before proceeding to consider the questions posed to us, it is necessary to state in brief the facts of the case.

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The Facts

[3] The appellant is a bank. The respondent was in the employment of the appellant. At all material time he was the Branch Manager of the Tanah Merah branch of the appellant. On
B joining the appellant the respondent executed the Employee's Service Agreement dated 16 June 1979 ("the service agreement"), the pertinent part of which reads as follows:

> I … hereby agree that I will, during all the time that I continue in the employment of the Bank in any capacity, faithfully, diligently
C and carefully attend to the business of the bank, and *to the best of my skill and ability perform all duties which may be required of me,* and observe and execute all such instructions or regulations as have been or may be given to me from time to time by any one in the employment of the Bank who may be set over me … *that I*
D *will on demand pay and make good to the Bank the amount of all loss, damage and expense which may be sustained or incurred by the Bank by or through the non-fulfilment of any of the obligations hereinbefore contained, or by or through any act, neglect or default done, permitted or suffered by me at any time while I continue in the employment of the Bank*. (emphasis added)

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[4] The respondent served as Branch Manager of the appellant's Tanah Merah branch ("the branch") from 27 March 1989 to 2nd August 1991. In his capacity as Branch Manager the respondent approved banking facilities to numerous borrowers. On 3
F November 1992, an internal audit was carried out at the branch. Following which a report was prepared. The report disclosed that the respondent had been guilty of several breaches of his contractual duties. Disciplinary action was subsequently taken against him, culminating in his dismissal with effect from 1
G September 1994. The appellant then commenced this action against the respondent.

The Claim

[5] The claim is premised on the alleged breaches of duty
H committed by the respondent which may be summarized as follows:

1. The respondent had approved and granted loans to 4 joint applicants who were not immediate family members contrary to
I the standard practice instructions of the bank;

2. The respondent failed to reduce the credit limit of two borrowers (M.M. Timur Trading and Sy. Pemborong Ekonomi) after each repayment in respect of the overdraft facilities granted to the two borrowers, contrary to the condition imposed by the appellant; and

3. The respondent breached his implied contractual duty of care and skill by grossly overvaluing properties pledged as collaterals for loans given to 12 borrowers.

[6] In the statement of claim the plaintiff alleged that by reason of the breaches of duty, his incompetence and negligence the appellant has suffered loss and damage and had been put to expense which up to 31 March 1995 is estimated to be RM1,583,616.62. Consequently the appellant claims the said sum and other damages together with interest and costs.

The Finding of The High Court

[7] The learned judge of the High Court agreed with the submission of counsel for the appellant that the respondent had been in breach of the implied term of the contract in failing to carry out his duties with proper care and skill. However, he held that being a claim in indemnity, it is incumbent for the appellant to prove its losses, which it failed to do. In the circumstances the plaintiff's claim was dismissed.

The Finding of The Court of Appeal

[8] The Court of Appeal in a majority decision of two to one dismissed the appellant's appeal. However, in coming to its decision the Court of Appeal disagreed with the learned judge of the High Court on the invocation of an implied term into the contract requiring the respondent to carry out his duties as employee of the appellant with proper care and skill. This is found in the following passage of the judgment of the Court of Appeal:

> 7. The relationship between an employer and employee being contractual, it is subject to the general principles governing the implication of a term in a contract. One such principle is that a term will not be implied if there is no necessity to do so. And the test of necessity is not met where the contract already contains a clear express stipulation to the same effect as that sought to be implied. As Gibbs J said when delivering the judgment of the British Columbia Court of Appeal in *Vic Van Isle Construction Ltd. v. School District No. 23 (Central Okanagan)* 69 ACWS (3d) 1051:

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> There is a constant theme running through implied term cases and that is that a term will not be implied in the absence of necessity being shown. For a discussion of the necessity factor see p. 429 *et. seq. of Canadian Pacific Hotels v. Bank of Montreal* [1987] 40 DLR (4th) 385.

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> In the present instance, there is an express promise in terms of the one which the plaintiff seeks to have implied. Here, the defendant has expressly promised that he will – to quote from the contract in this case – "to the best of my skill and ability perform all duties which may be required of me". There is therefore no

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> necessity to imply a term to the identical effect. For, it is a principle of great antiquity that a court will not act in vain. It is therefore my judgment that the submission of learned counsel for the plaintiff on this point is without merit. With that I now turn to the principal issue in this case.

D **[9]** In short the court held that the relevant terms binding on the parties are that as expressly provided in the service agreement and there is no room for any implied term as contended by learned counsel for the appellant. Based on the agreement the Court of Appeal held that the appellant is only entitled to a right in

E indemnity as provided under the agreement. Being a claim in indemnity the court held that "… it was imperative for the plaintiff bank to prove that it suffered the losses in the pleaded case. That is what the learned judge held: and I am in agreement with him. It is common ground that the plaintiff did not prove its case."

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The Appeal

[10] We will now consider the first question posed to us in this appeal. The issue as put by the appellant is whether the appellant in this case is only confined to suing on indemnity because the

G agreement contains an indemnity clause, or does the appellant have a choice to sue for either breach of contract or, on the indemnity. The learned counsel for the appellant submitted that it has such a choice. It is also the appellant's contention that at common law, the right of a contracting party to claim damages for

H breach of contract may only be excluded by express or implied terms of the contract.

[11] It is settled law that a contract may give rise to several distinct causes of action. (See *Telfar Shipping Corporation v. Inersea*

I *Carriers S.A.* [1983] 2 Lloyd's Rep. 351.) The right to sue for damages for breach of contract is a distinct cause of action to that of right to sue for indemnity provided that the agreement or

arrangement entered into is one of a contractual relationship as ordinarily understood in law and not a contract of indemnity simpliciter. It is therefore a matter of construction on the nature of the relationship created in the first place. This is clearly recognized by the authorities cited to us. Take the case of *Birmingham and District Land Company v. London and North Western Railway Company* [1886] 34 Ch D 261. There at p. 274 Bowen LJ stated the position as follows:

> But it is quite clear to my mind that a right to damages, which is all that the Defendants have here if they are entitled to anything, is not a right to indemnity as such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. **It is an incident which the law attaches to the breach of a contract and is not a provision of the contract itself.** (emphasis added)

[12] Fry LJ in the same case at p. 276 observed as follows:

> Now in my view the word 'indemnity' in the rule which we have now to construe, means to express a direct right either at law or in equity to indemnity as such, and I think that this right has to be contrasted, and not to be confounded, with the right to damages which arises either from a breach of contract or from tort. A breach of contract gives rise, or may give rise, to a right to damages, but those damages are not the subject of the contract. They arise from the breach of the contract, and therefore they are in no sense the subject of the contract itself … *It is the common law right which everybody has to damages for a wrong which has been done to him. Therefore the right to such damages is not a right to indemnity, although when you come to ascertain what the measure of damages is, it may be that indemnity will properly express that measure of damages.* (emphasis added)

[13] The Indian case of *Krishnaswami Iyer v. Thathia Raghaviah Chetty and Others* AIR [1928] Madras 43, restated the same point in the following manner:

> Now in the case of contracts, right to indemnity must be carefully distinguished from right to damages. A right to indemnity is given by the original contract, whereas a right to damages arises in consequence of the breach of that contract. These two rights are confounded and one reason for the confusion is, that when a contract is broken, indemnity is often found to coincide with the measure of damages. In these cases, whether the right

A is called right to indemnity or right to damages, practically the same result follows, and it is forgotten that these two words express two fundamentally different legal ideas.

[14] This very point was given recognition by the Court of Appeal. This is plain from the judgment of the court but the court B was of the view that the parties' rights are governed by the service agreement and as such the appellant is only entitled to claim for indemnity and not for damages.

[15] The law on damages has moved a long way since the C decision of the House of Lords in *Attorney-General v. Blake* [2001] AC 268. But that is not our concern here. The traditional view is that damages for a breach of contract committed by the defendant are compensation to the claimant for the damage, loss or injury suffered through that breach. (See *Chitty On Contracts* Vol. 1 29th D edn. para. 26-001.) This is the common law right arising from the breach of a contract and it is not the subject of the contract. In other words it need not be provided for in the contract. (See the judgment of Fry LJ in *Birmingham and District Land Company v. London and North Western Railway Company (supra)*). This right is E contained in s. 74(1) of the Contracts Act 1950 which reads:

> S. 74(1) when a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused F to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

[16] By contrast indemnity is a right which has to be provided for in the original bargain between the parties. It is a formal legal G acceptance of responsibility for damage or loss. Indemnity springs from contract express or implied. (See P. Ramanatha Aiyur's *The Law Lexicon* 2nd edn.) As stated earlier indemnity and damages as incidence to breach of contract or tortious act are not synonymous but distinct. On the above analysis, therefore, the H fact that the agreement provides for indemnity, that alone, in the absence of any express or implied term in the agreement taking away the appellant's right for damages, in our view, would not prevent the appellant from making a claim for damages for breach of contract. In short the indemnity clause as contained in the I service agreement in the present case does not take away the right of action for damages for breach of contract: the s. 74(1) right.

Our view found support in the Singapore Court of Appeal case of *Management Corporation Strata Title Plan No 1933 v. Liang Huat Aluminium Ltd* [2001] 3 SLR 253.

[17] In that case the claim by the appellant was for breach of contract under a deed called "Indemnity For Aluminium & Glazing Works". The High Court dismissed the claim on the ground that the claim under the deed was one for an indemnity and such claim had not arisen, and that on the construction of the terms of the deed the appellant was not entitled to claim damages for breach of contract. On appeal, the decision of the High Court was reversed by the Court of Appeal. The decision in that case turns essentially on the construction of cl. 4 of the deed which reads as follows:

> Should the Contractor or the Sub-Contractor fail to perform their obligations under Clauses 2 and 3 above within the time directed by the Employer or in the absence of such direction, within a reasonable period, the Employer shall [sic] entitled to remedy the said defects and the Contractor and the Sub-Contractor shall forthwith on demand reimburse the Employer all costs and expenses incurred by the Employer for making good the said defects including all legal costs on a Solicitor and Client basis incurred by the Employer in enforcing this Clause.

[18] LP Thean JA in delivering the majority judgment stated as follows:

> Now, that being the provision of cl. 4 and construing cll. 2, 3 and 4 together, the crucial question is: has cl 4, by its express terms or by necessary implication, taken away the right, which the MC has at law, namely, the right of action for damages for breach of contract? The answer is clearly a resounding 'No'. There is nothing in cl. 4, expressly or impliedly, which suggests that such a right of the MC has been taken away.
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> In *P & M Kaye v. Hosier & Dickinson* [1972] 1 All ER 121 at 139; [1972] 1 WLR 146 at 165-166, Lord Diplock, in discussing the question of a building owner recovering consequential loss or damage arising from the contractor's breach of contract in respect of defects in workmanship or materials, said:
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> > At common law a party to a contract is entitled to recover from the other party consequential damage of this kind resulting from that other party's breach of the contract, unless by the terms of the contract itself he has agreed that such damage shall not be recoverable. In the absence of express words in the contract a Court should hesitate to hold that a party had surrendered any of his common law

A rights to damages for its breach, although it is not impossible for this to be a necessary implication from other provisions of the contract.

His Lordship then continued:

B I can read no such necessary implication into cl. 15 or any other clause of the RIBA contract … the contractor is under an obligation to remedy the defects in accordance with the architect's instructions. If he does not do so, the employer can recover as damages the cost of remedying the defects, even though this cost is greater than the diminution in value C of the works as a result of the unremedied defects.

But there are no express words in cl. 15 which deal with consequential damage at all, notwithstanding that the clause is dealing with breaches of contract, ie 'materials or workmanship not in accordance with this Contract', D discovered in circumstances in which it could be foreseen they would be likely to cause some consequential damage beyond that which is capable of mitigation by remedying the defects. I can see nothing in the provisions of cl. 15 to which I have referred to give rise to any necessary implication that the employer was surrendering his right at E common law to recover damages for any consequential loss sustained by him as a result of latent defects discovered during the defects liability period.

[19] At p. 264 he continued:

F We find further support in the following passage in Vol 1 of *Hudson's Building and Engineering Contracts* (11th Ed) at 5-053:

It is always a question of construction whether the rights under the maintenance clause are intended to supplant the G right to damages at common law altogether. In the absence of express provision, the remedies under these clauses are in addition to and not in substitution for the common law rights, and even where the defects have appeared within the period the owner may sue for damages rather than call on the contractor to do the work, subject, in that event, to the H possibility of the owner's damages being limited, if he has acted unreasonably in the light of the discussion in the preceding paragraphs, to the cost to the contractor of doing the work at that time, rather than the possibly greater cost of bringing in another contractor either then or at a later date.

I In our judgment, the MC has a right of action against Liang Huat for damages for breach of contract and this right has not been taken away by cl. 4 of the deed. We therefore allow the

> appeal with costs here and below, and set aside the judgment below. We enter interlocutory judgment in favour of the MC with damages to be assessed and award interest on the damages so assessed at the rate of 6% pa from the date of the writ to the date of final judgment. The deposit in court as security for costs, with interest, if any, is to be refunded to the MC or its solicitors.

[20] It is true the Management Corporation case and the cases referred to therein are building contract cases, but we are of the view that the same principle would apply to contract of employment cases.

[21] On contractual duty of an employee, in *Lister v. Romford Ice and Cold Storage Co Ltd* [1957] AC 555, Viscount Simonds at p. 573 observed:

> But, in deference to Denning L.J., I think it right to say that I concur in what I understand to be the unanimous opinion of your Lordships that the servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract, and that this (apart from any defence) is such a case. It is trite law that a single act of negligence may give rise to claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in performance of his duty is a clear example.

[22] And at p. 579 he added:

> The common law demands that the servant should exercise his proper skill and care in the performance of his duty: the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master: other sanctions there may be, dismissal perhaps and loss of character and difficulty of getting fresh employment, but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master, and now to grant the servant immunity from such an action would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community. This was, I think, an aspect of the case which made a special appeal to Romer L.J. It cannot be disregarded.

[23] Similarly in *Janata Bank v. Ahmed* [1981] IRLR 457 following *Lister v. Romford* the Court of Appeal held that an employer is entitled to claim against an employee for damages for negligence in the course of his work. The court rejected the contention of the employee that the only duty implied by law in a contract of

employment is a duty to indemnify the employer in respect of the employer's tortious liability to a third party caused by the employee's negligence.

[24] Reverting to the present case, we agree with the appellant that there is no express or implied term in the agreement excluding the appellant's right to damages for breach of contract. We would go so far to say that upon close scrutiny of the service agreement we are of the view that it is not a contract of indemnity per se, rather it is a contract of employment setting out the contractual duties and obligations of the respondent as an employee of the appellant with an indemnity clause added as an alternative remedy. In the circumstances, we agree with the appellant's submission that the respondent as employee of the appellant owes a contractual duty of care to the appellant and breach of that duty would render him liable to the appellant in damages for breach of contract. This is the common law right of the appellant as the employer. This right cannot be taken away without express or implied term in the contract. We find no such term in the service agreement in the present case.

The Statement of Claim

[25] The learned counsel for the respondent further contended that the claim is based wholly on the service agreement which is a complete agreement. As such there is no room for implication of further term. He submitted, the service agreement is the foundation of the appellant's claim.

[26] Let us now consider the statement of claim filed herein. Shorn off the formal part, the material part of the claim are essentially as follows. Paragraph 3 of the claim sets out the material terms of the service agreement. The respondent's duties and obligations under the service agreement and his common law duty of care are adverted to in paras 4 to 6 of the statement of claim. The particulars of the respondent's breaches are housed in paras 7 and 8 of the claim. The consequences of the breaches are set out in para 9. This is followed by the estimated loss as of 31 March 1995. The appellant prayed for, *inter alia*: (a) estimated loss of RM1,583,616.62 and (b) damages, and followed by the usual prayers for interest and costs. It should be noted that there is no prayer for indemnity.

[27] Thus from the general tenor of the claim we agree with the observation of Abdul Aziz Mohamad JCA (as he then was) in his judgment that the claim in this case "… was framed as a claim for breach of contract and not as a claim of right to indemnity." A

[28] It is true that the statement of claim does refer to the service agreement, which contains an indemnity clause, but that in our view does not turn it into a claim in indemnity as urged upon us by the respondent. Reference to the service agreement is in the circumstances necessary in order to establish that at the material time the respondent was in the employment of the appellant. Having scrutinized the claim we are not persuaded that the claim is one of indemnity rather than for damages for breach of contract. At the risk of repetition, we must say that in the absence of express or implied term in the service agreement excluding the appellant's right to damages for breach of contract, the appellant in our view is entitled to claim for damages arising from breach of any express or implied term of the service agreement. We are satisfied that there is no such exclusionary term in the service agreement. B C D

[29] The authorities referred to us by the respondent such as *Montagu Stanley And Company v. J.C. Solomon, Limited* [1932] 2 KB 287 and the case of *R. & H. Green & Silley Weir Ltd. v British Railways Board* [1985] to cite just a few, are strictly cases involving indemnity claim and are of no direct relevance to the issues before us. Similarly we think the case *Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd.* [1987] 2 MLJ 1, could not assist the respondent's case either. In that case the Privy Council held, *inter alia*, that on its proper construction cl. 17 of the agreement imposes an obligation on the respondent housing developer to pay in substitution for any other right to damages which the purchaser might have, a single sum to be calculated and ascertained at a particular date and until that sum has been ascertained it does not become due and cannot be sued upon. That case is no authority for the proposition that damages is not recoverable for breach of a contract where the agreement contains an indemnity clause. The case turns on the issue when does the cause of action accrue on the facts of that case. Was it at the end of the 18 calender months from the date of the agreement or on the date of actual completion and delivery of possession of the building, the subject matter of the agreement. On the proper construction of cl. 17 the Privy Council held that the cause of action accrued on the latter date. E F G H I

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The Trial Before The High Court

[30] It is common ground that by consent of parties the trial before the learned High Court Judge proceeded on the issue of liability alone, subject to assessment of damage. This is sometimes referred to as the split trial procedure. This procedure is often resorted to in actions for damages for negligence in respect of damage to persons or property. However as stated by the House of Lords in *Yorkshire Electricity Board v. British Telecommunications plc and Others* [1986] 2 All ER 961, "... in any such case the plaintiff who obtains such a judgment is already entitled to recover damages and if the court were asked to quantify those damages it could always do so immediately even though this would involve looking at the future as well as the past and estimating the effect of future contingencies." The House of Lords deemed it unacceptable the concept of a judgment finally determining liability in favour of a plaintiff who may in the event be entitled to nothing. In the present case, it was not the respondent's case that the appellant had not incurred any loss at the material time and would not be able to quantify its loss if required to do so. As a matter of fact the appellant in its claim had estimated its loss as at 31 March 1995 being over RM1.5 million. Therefore it could not be gainsaid that the appellant had not incurred any loss as at the date of trial. The question whether it can prove its loss is left to be seen at the assessment of damage stage.

[31] Based on the above, it is our finding that the claim in the present case is one for damages for breach of contract and not a claim for indemnity contrary to the finding of the trial court and the majority judgment of the Court of Appeal. In the circumstances, we agree with the minority judgment of the Court of Appeal that judgment be entered in favour of the appellant on liability and damages to be assessed. Accordingly we direct that this case be remitted to the High Court for assessment of damages by the registrar.

The Result

[32] On the above premise we would answer the first question in the positive, and in the circumstances, we do not think it is necessary for us to answer the other two remaining questions. Accordingly, the appeal herein is allowed with costs here and in the courts below and the deposit be refunded to the appellant.